Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 02-136
Table of Allotments,	)	
FM Broadcast Stations	)	
(Arlington, The Dalles, Moro, Fossil, Astoria	)	
Gladstone, Tillamook, Springfield-Eugene,	)	
Coos Bay, Manzanita and Hermiston, Oregon	)	
and Covington, Trout Lake, Shoreline, Bellingham,	)	
Forks, Hoquiam, Aberdeen, Walla Walla,	)	
College Place, Long Beach and Ilwaco, Washington)	)	

To: Assistant Chief, Audio Division, Media Bureau

REPLY TO OPPOSITION

Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (together "Counterpetitioners") herein reply to the "Opposition to Motion" of Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), First Broadcasting Company, L.P. ("First Broadcasting") and Saga Broadcasting Corp. ("Saga") (together "Joint Parties") to the Counterpetitioners "Motion to Sever." In reply, the following is stated:

Through their motion, the Counterpetitioners urge the Commission to sever the Joint Parties' amended proposal from this proceeding and hold consideration of that proposal in abeyance pending resolution of this proceeding.

Counterpetitioners' motion, based on the Commission's *Taccoa* policy,[1] is well founded and should be granted. Over recent years, the Commission's staff has been confronted again and again with situations in which a rulemaking petitioner's true proposal is revealed only on the counterproposal deadline. In such cases, the initial petition is little more than a feint. Such maneuvering leads to administrative inefficiency and unfairness to other parties. *Taccoa*, 16 FCC Rcd at 21192 (¶ 5). The Commission correctly has concluded that processing two inconsistent proposals for the same party in a single rulemaking causes "an unnecessary expenditure of staff resources without any offsetting public interest benefits and is not conducive to the efficient transaction of Commission business." Id. Through *Taccoa*, the Commission thus gave notice that in the absence of a satisfactory explanation as to why it could not have been set forth in the initial rulemaking proposal, a counterproposal advanced by the original petitioner will not be considered in the same proceeding.

Notwithstanding the Joint Parties' denials, the circumstances here fit the *Taccoa* policy, which precludes consideration of the Joint Parties' amended proposal in this proceeding. First Broadcasting and Mid-Columbia initially filed a proposal to relocate Station KMCQ(FM) from The Dalles, Oregon, to Covington, Washington, downgrading the station's allotment from Channel 283C to Channel 283C3 in the process. That proposal generated a *Notice of Proposed Rule Making*, DA 02-1339 (released June 7, 2002). Then, on the deadline for comments and counterproposals, First Broadcasting and Mid-Columbia, now joined by Saga, presented for the

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[1] *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (Chief, Allocations Branch, released November 30, 2001).

first time their plan to move Station KMCQ not to Covington, but to Kent, Washington.[2] The change is facilitated by Saga's willingness to change the frequency of Station KAFE(FM), Bellingham, Washington, from Channel 282C to Channel 281C, and to operate with a directional antenna if necessary.

Contrary to the Joint Parties' self-serving claims, Saga's belated willingness to participate in First Broadcasting's and Mid-Columbia's reallotment plan does not constitute the sort of unforeseen change in circumstances that would justify consideration of their amended proposal in this proceeding. The Joint Parties acknowledge again in their Opposition, as they did in their amended proposal, that First Broadcasting negotiated with Saga prior to the filing of the initial rulemaking petition but did not reach an agreement. First Broadcasting states that at some point it concluded that negotiations were at an end and that it "was forced" to file its initial proposal without including the channel change for Station KAFE. But in fact First Broadcasting was not "forced" to file its rulemaking petition at that time – or at any particular time. First Broadcasting and Mid-Columbia simply chose to do so. Having made that choice, triggering the rulemaking notice to which other parties responded, they must live with the consequences.

Saga's recent alleged change of heart supposedly is based on "regulatory changes" in Canada. In reality, however, the only change that appears to have occurred is Saga's claimed level of "confidence" that Industry Canada would accept a proposed rearrangement of Canadian allotments to allow Station KAFE to operate on Channel 281C without using a directional antenna or limiting power. Significantly, the Joint Parties present nothing from Industry Canada

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[2] Mid-Columbia's and First Broadcasting's initial petition expressed concern about the need for Covington to receive its first transmission service. Their desire to meet Covington's pressing need for service obviously has now evaporated.

itself indicating that the proposed rearrangement is acceptable or likely to be adopted. Nor do they claim that any specific post-petition change in Canada's allotment policies made possible for the first time the introduction of the amended proposal. Indeed, the Joint Parties can point to nothing more than the conclusory and self-serving opinions of their Canadian consultants that Industry Canada has shown new "increased flexibility" and "openness" to consider various types of engineering proposals. Moreover, the Joint Parties do not and cannot explain why, if the gradual "change" in Industry Canada's attitude was so important, they could not have waited until Saga had gained sufficient assurance of Canadian cooperation before filing their proposal as an initial petition for rulemaking.

Indeed, Industry Canada's willingness to accommodate full-power omnidirectional operation of KAFE on Channel 281C obviously is not even the linchpin of Saga's consent. Saga did not make its belated consent conditional upon Industry Canada's approval. To the contrary, Saga states that it is willing, if necessary, to install a directional antenna or reduce power to protect the Canadian allotments with which KAFE would be short-spaced on Channel 281C.

In essence, the Joint Parties are saying that they would like the Commission to negotiate with Canada regarding rearrangement of various Canadian allotments so KAFE could operate on Channel 281C at full power omnidirectionally, but that if such negotiations fail (or if the Commission declines to present the Joint Parties' proposal), KAFE will employ a directional antenna and/or reduced power on the new channel. That proposal obviously could have been made at the time the initial rulemaking petition in this proceeding was filed. The reason it was not, as First Broadcasting admits, is that First Broadcasting and Mid-Columbia had not reached an agreement with Saga. Joint Parties' Opposition at ¶ 2. Again, the fact that First Broadcasting and Saga had not yet struck a bargain at the time the initial proposal was filed, but were able to

do so later, does not constitute the sort of "unforeseen circumstances"[3] that could justify consideration of the Joint Parties' amended proposal in this proceeding.

The Joint Parties also argue that Saga could have advanced the counterproposal on its own, and that rejection of the amended proposal would somehow deny Saga its right to participate in this proceeding. But clearly, Saga did not advance its own proposal and had no incentive to do so, apart from whatever bonus First Broadcasting is paying Saga.[4] Indeed, Saga gains nothing by moving from Channel 282C to Channel 281C.[5] The change does not permit Saga to increase its power or otherwise improve its coverage. On the contrary, the impetus for the amended proposal is the desire of First Broadcasting and Mid-Columbia to relocate KMCQ to a larger and more attractive market. Thus, although they have now secured Saga's consent, the actual *proponents* of the amended proposal – First Broadcasting and Mid-Columbia – are exactly the same as they were in the initial petition for rulemaking.[6] Saga could have participated in the original filing or in an independent rulemaking counterproposal, but did not

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[3] *See Taccoa,* 16 FCC Rcd at 21192 (¶ 5).

[4] Saga, in its Reply Comments filed, acknowledges that First Broadcasting has agreed to compensate Saga in excess of the amount that would be due under the reimbursement standards in *Circleville, Ohio*, 8 FCC 2d 159 (1967).

[5] Of course, as demonstrated in the Counterpetitioners' proposal, neither would Saga suffer any material loss of coverage in the United States by operating with a directional antenna on Channel 281C.

[6] The Joint Parties argue that if Saga had "styled" its pleading as a "counterproposal," it could "hardly be denied" that the pleading would have been permissible, and to claim otherwise would "elevate form over substance." Opposition to Motion at 4. To the contrary, the simple fact is that there has been no fundamental change in the *proponents* of the amended proposal. The only difference is that Saga has added a consent that could have been secured previously and advanced in the original petition.

choose to do so. Consequently, Saga's appearance at this stage in the proceeding cannot save First Broadcasting and Mid-Columbia from application of the *Taccoa* policy.

As a final matter, the Joint Parties appear to argue that if the *Taccoa* policy were to be applied here, their amended proposal would have to be treated as an initial proposal and entitled to be compared with the other timely filed counterproposals. Presumably such an action would lead to the issuance of a new Notice of Proposed Rule Making and potentially another round of counterproposals. Clearly, however, *Taccoa* was not intended to foster such a procedure. The Commission in *Taccoa* expressed its concern with the unnecessary expenditure of staff resources in processing two inconsistent proposals from the same party. The procedure the Joint Parties suggest does nothing to address that concern and would not be conducive to the efficient transaction of the Commission's business.

Indeed, adoption of the procedure suggested by the Joint Parties could stretch out allotment proceedings endlessly, as the Commission dealt with one abandoned proposal after another. More importantly, it would read *Taccoa* out of existence by allowing initial petitioners to change proposals mid-stream and, if challenged, obtain a free pass to start again. But *Taccoa* provides for no such second chance. Whether the Joint Parties' amended proposal must be held pending a separate proceeding is a threshold question that must be considered independently of the existence of any other counterproposals.

The procedure outlined in the Counterpetitioners' Motion to Sever more appropriately addresses the Commission's concern as outlined in *Taccoa*. Where a party submitting a counterproposal to its own original petition fails to adequately explain why its amended proposal could not have been presented initially, consideration of the amended proposal must await the

Commission's decision with respect to the initial proposal (if not deemed abandoned) and the counterproposals timely filed by other parties.

WHEREFORE, in light of all circumstances, the Counterpetitioners respectfully request that the Joint Parties' amended proposal be SEVERED from the above-captioned proceeding and HELD IN ABEYANCE pending final resolution of this proceeding.

TRIPLE BOGEY, LLC
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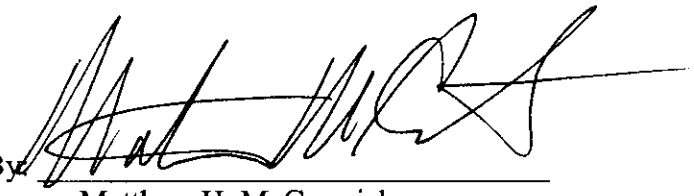
KDUX ACQUISITION, LLC



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September 10, 2002

CERTIFICATE OF SERVICE

I, Janice M. Rosnick, do hereby certify that I have on this 10TH day of September, 2002, caused to be hand delivered or mailed by First Class Mail, postage prepaid, copies of the foregoing REPLY TO OPPOSITION to the following:

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